Appendix A
Court of Appeals' Opinion

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-3684

Clipper Exxpress, a corporation,
Plaintiff-Appellant,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., Yellow Freight Systems, Inc., Consolidated Freightways Corporation of Delaware, Illinois-California Express Inc., IML Freight Inc., Pacific Intermountain Express Co., T.I.M.E.—D.C. Inc., Consolidated Copperstate Lines, Garrett Freight Lines, Inc., Navajo Freight Lines, Inc., N.W. Transport Service, Inc., Ringsby Truck Lines, Inc., Rio Grande Motor Way, Salt Creek Freight Ways, Transcon Lines, United Buckingham Freight Lines and Western Gillette, Inc.,
Defendants-Appellees.

[April 19, 1982]

As Amended July 29, 1982.

Appeal from the United States District Court for the Northern District of California.

Before: WALLACE and ALARCON, Circuit Judges, and von der HEYDT,* District Judge

ALARCON, Circuit Judge:

Plaintiff Clipper Exxpress (Clipper) appeals from the entry of an order granting summary judgment for the defendant

* Honorable James A. von der Heydt, Chief United States District Judge, District of Alaska, sitting by designation.

trucking companies and Rocky Mountain Motor Tariff Bureau (RMMTB) [hereinafter jointly referred to as defendants]. Clipper sued defendants for various antitrust violations arising from protests filed with the Interstate Commerce Commission (ICC) by defendants with regard to certain shipping rates published[1] by Clipper. The district court granted summary judgment for defendants based on (1) the *Noerr-Pennington*[2] exception to the antitrust laws, which the district court held cloaked the defendants' actions with immunity, and (2) the *Keogh*[3] doctrine, which the district court held barred the recovery of damages in this antitrust action. We reverse and remand for a trial on the merits because neither the *Noerr-Pennington* exception nor the *Keogh* doctrine provide defenses as a matter of law under these facts.

FACTS

Clipper is an ICC-regulated freight forwarder, subject to regulation under the Interstate Commerce Act (ICA). As a freight forwarder, Clipper itself ships no goods, but rather assembles and consolidates small shipments into single lots for shipment by carrier companies.

Defendants are ICC-regulated trucking companies and the RMMTB. RMMTB is a rate bureau formed under the ICA. A rate bureau is an organization formed by an agreement among common carriers. Through the bureau the carriers act collectively to initiate, consider and establish rates and fares for members of the bureau. When acting in conformity with an ICC-approved agreement, joint rate setting action is not subject to the antitrust laws. 49 U.S.C. § 10706. RMMTB's membership consists of approximately 1,400 motor carriers, and represents approximately 80 percent of the transcontinental surface transportation market.

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1. Publishing is simply the act of filing a new rate with the ICC.

2. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

3. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922).

ICC rate regulation of freight forwarders such as Clipper is provided in 49 U.S.C. § 1005, recodified as 49 U.S.C. §§ 10725, 10762. Under § 1005, a freight forwarder seeking a rate change publishes a new rate. In the absence of a protest, the rate will take effect automatically thirty days later. If there is a protest, the ICC can suspend effectiveness of the rate while investigating the protest. The ICC also retains power to suspend any new rate sua sponte, but this power is rarely exercised.

In the late 1960's, freight forwarding was a failing industry. The freight forwarding industry suffered heavy traffic losses because of the competition presented from "shipper associations" and "shipper agents" whose rates were unregulated. An ICC investigation revealed that the freight forwarder's economic predicament was due to the lower rates of these unregulated associations. The ICC recommended that the freight forwarders lower their rates to compete effectively with the lower rates of unregulated associations.

In November 1970, Clipper, in order to compete with the rates of the unregulated associations, published Tariff 55, a lowered rate of $1,056 per 30,000 pound shipment. Clipper hoped to eventually lower its rate to $842 per 30,000 pounds. Clipper fully expected defendants to protest to the ICC any lowered rate it published.[4] Clipper hoped that by publishing the intermediate $1,056 rate instead of the lower $842 rate, the ICC would not act on defendants' anticipated protest by investigating and suspending implementation of Clipper's new rate. Clipper intended to lower its rate to 842 if the ICC did not investigate and suspend the intermediate rate.

As expected, a few days after the $1,056 Tariff 55 was published, RMMTB filed a protest to Tariff 55 with the ICC. The ICC did not suspend the $1,056 rate, but did investigate the rate over the next two years. During the course of the ICC investigation, Clipper filed several amendments to Tariff

4. Clipper alleged that RMMTB had always tried to maintain the rates of freight forwarders and carriers at an equal level (parity) and would take forceful action—including protests—to maintain that parity.

55—which both extended the geographical coverage of the rate and progressively lowered the rate. RMMTB protested each amendment. The ICC found for Clipper throughout its investigation. The defendants exhausted all the ICC procedures in order to prevent implementation of Tariff 55, and received no relief. At the conclusion of this administrative process, Clipper lowered Tariff 55 to the $842 level; defendants' protest to this rate was also unsuccessful.

THE PROCEEDINGS BELOW

In 1972 Clipper filed a complaint in district court against RMMTB and various trucking companies, alleging antitrust violations. In addition, to avoid the general principle that genuine efforts to induce legislative or administrative action, even if undertaken for the purpose of stifling competition, are outside the scope of the antitrust laws, Clipper relied on three theories in its pleadings. First, Clipper contended that defendants' protests of Tariff 55 were sham protests filed "for the purpose of directly restricting, lessening, and prohibiting the legitimate competition" of freight forwarders. Second, Clipper contended[5] that defendants attempted to influence ICC action by supplying fraudulent information to the ICC. Clipper relied on the *Walker Process*[6] doctrine, which extends antitrust liability to one who commits fraud on a court or agency to obtain competitive advantage. Finally, Clipper contended that the protests were simply part of a larger independent antitrust violation.[7]

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5. This claim was asserted in an amended complaint filed February 3, 1977.

6. *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965).

7. It should be noted that the fact that a party successfully establishes that the *Noerr-Pennington* exception is inapplicable does not entitle it to a judgment. Such a showing would merely establish that defendant's conduct was subject to the antitrust laws. "[T]he absence of an immunity does not itself establish an antitrust offense. To prevail, the plaintiff must demonstrate that any non-immune behavior meets the standard tests defining an antitrust violation." Areeda & Turner, Antitrust Law § 201 (1978).

Clipper claimed it sustained thirty million dollars of damages because of the actions of defendants and sought treble that amount. These damages allegedly represented (1) the loss incurred by Clipper in having to delay over two years before instituting its final $842 rate; (2) the costs in having to respond to the protests; and (3) business loss because of the instability and uncertainty surrounding Clipper's rates, due to the ICC investigation. Clipper claims that shippers will not use a rate if it is under ICC investigation.

Proceedings were stayed by the district court judge to permit the ICC to rule on defendants' protests. After the ICC overruled all the protests, court proceedings were revived.

After denying two previous motions by the defendants for a summary judgment, defendants' third summary judgment motion was granted on July 27, 1978, and entered on July 31, 1978. The district court held that the protests to the ICC were immune as a matter of law, relying on *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977). Moreover, the district court held that Clipper was attempting to collect damages which rest on assumptions as to ICC actions, and held this was prohibited as a matter of law by *Keogh* v. *Chicago & N. W. Railroad Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922).

JURISDICTION

The defendant-appellees contend that this court is without jurisdiction over this appeal because Clipper did not file its Notice of Appeal within the requirements of Rule 4(a) of the Federal Rules of Appellate Procedure.

Timely filing of a Notice of Appeal is a prerequisite to this court's appellate jurisdiction. *See Browder* v. *Director, Department of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54

L.Ed.2d 521 (1978). We find that this Notice of Appeal was timely filed and we therefore hold that this court has jurisdiction over this appeal.[8]

Rule 4(a) of the Federal Rules of Appellate Procedure provides that a Notice of Appeal is to be filed within thirty days of entry of judgment. The thirty-day period, however, is tolled by the timely service of a Rule 59(e) motion to reconsider and vacate the judgment. If a 59(e) motion is timely served, the time for filing a Notice of Appeal is tolled and does not begin running until the district court disposes of the 59(e) motion. *See* Fed.R.App.P. 4(a)(4).[9]

Summary judgment for defendants was entered on July 31, 1978. Ten days later, on August 10, 1978, Clipper *served* a notice of motion and a motion to reconsider and vacate the order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, supported by a memorandum of points and authorities. Clipper filed this motion in the district court on August 14, 1978. The motion was argued on September 11, 1978 and denied on October 13, 1978. Twenty-four days after the denial, on November 6, 1978, Clipper filed its Notice of Appeal.

Defendants contend that Clipper's 59(e) motion was not sufficient to toll the time for appeal on two grounds. First, defendants contend that the material served by Clipper on August 10 was incomplete, and therefore could not toll the time for filing a Notice of Appeal. Specifically defendants contend that because the motion itself stated that it was based on affidavits, and affidavits were not served with the motion, the

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8. Because we reverse the grant of summary judgment and remand for a trial on the merits, we need not determine whether the district court judge acted properly in denying Clipper's 59(e) motion to vacate and reconsider.

9. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." *See Pacific Maritime Ass'n* v. *Quinn*, 465 F.2d 108, 109 n.1 (1972) (service, not filing, tolls the running of time to file notice of appeal). Clipper served its 59(e) motion on August 10, 1978, after a July 31, 1978 entry of judgment. Thus, under the rules of time computations provided in Rule 6(a) of the Federal Rules of Civil Procedure, this motion was served within the time strictures established in 59(e).

motion was not a valid, complete 59(e) motion. Second, defendants contend that Clipper's 59(e) motion simply rehashes the arguments made in the summary judgment motion, and therefore does not constitute a valid 59(e) motion. We find no merit in either of these arguments.

A. *Complete Motion*

The defendants' contention that Clipper's 59(e) motion was incomplete because the supporting affidavits were not filed within the time for service is spurious. The 59(e) motion was complete, valid, and sufficient to toll the running of time to file the Notice of Appeal without the affidavits. Rule 59(e) itself does not require supporting affidavits. The only indication in the Federal Rules of Civil Procedure as to what is necessary to constitute a valid motion is found in Rule 7(b)(1). Rule 7(b)(1) states that a motion "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."[10]

10. Rule 6(d) of the Federal Rules of Civil Procedure states: "When a motion is supported by affidavit, the affidavit shall be served with the motion. . . ." If, as here, a motion is complete without supporting affidavits, there is no reason to determine whether compliance with this filing requirement is jurisdictional when the affidavits are necessary to make the motion complete. We note, however, the position of the Seventh Circuit in *Schy* v. *Susquehanna Corp.*, 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970).

In *Schy*, the Seventh Circuit held that when the plaintiff did not complain of untimeliness of filing affidavits at the district court level, any objection based on that untimeliness was waived on appeal. *Id.* at 1116. It is questionable whether any proper objection to the untimeliness of these affidavits was raised at trial. Clearly, the defendant-appellees did not object to the late filing of the affidavits. They commented only that the affidavits came too late to substantively oppose the summary judgment. That is irrelevant to the 59(e) motion. A defendant who is not a party to this appeal questioned the timeliness of the affidavits under Rule 59(c) of the Federal Rules of Civil Procedure. Rule 59(c) relates to filing affidavits to support a motion for new trial, and does not apply to a 59(e) motion.

Because we hold, however, that the 59(e) motion was complete without the affidavits we need not determine whether the 59(c) assertion was sufficient to preserve the question of timeliness for appeal.

Clipper's 59(e) motion as originally served set out the grounds on which the motion was based with particularity. Along with the motion, Clipper filed a 65-page document of supporting points and authorities, which raised substantive legal questions about the summary judgment motion without the need for the additional factual support that the affidavits would provide. This was more than sufficient to satisfy the particularity requirement of Rule 7(b). Defendants cite *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53 (2nd Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 140 (1976), and *Martinez* v. *Trainor*, 556 F.2d 818 (7th Cir. 1977), in support of their contention that Clipper's motion was incomplete. Neither of these cases suggest that the motion filed by Clipper was insufficient and invalid as a 59(e) motion.

Daily Mirror is clearly distinguishable from the instant case. In *Daily Mirror* the plaintiffs filed a motion to vacate under Rule 60(b) of the Federal Rules of Civil Procedure after the trial judge granted summary judgment for defendants. 60(b) motions, even if valid, do not toll the time for filing notice of appeal. In footnote, the *Daily Mirror* court noted that while under some circumstances a court has discretion to treat a 60(b) motion as a 59(e) motion, such treatment would be inappropriate in this case. The court noted after deciding not to consider the rule 60 motion as a rule 59 motion, that the papers which were filed within the proper filing period were not a complete motion because they did not deal with the merits of the motion. It was only the late filed affidavits that dealt with the merits of the challenged summary judgment. 533 F.2d at 56 n.4. Defendants' reliance on *Martinez* v. *Trainor* is similarly unpersuasive. The motion filed in *Martinez* was insufficient as a complete motion. It noted, in less than a page, that the defendants requested the court pursuant to 59(e) to "alter, amend, or vacate" the earlier judgment. 556 F.2d at 819. The motion did not set forth the grounds for the motion with any particularity. It was, as noted by the Seventh Circuit, simply a skeleton, which required later supplementation to satisfy the particularity requirements of 7(b)(1). This is in marked

contrast to Clipper's motion which, as noted above, satisfied the particularity requirements of Rules of Civil Procedure. Defendants' contention that Clipper's papers are insufficient to qualify as a 59(e) motion is without merit.

B. *Failure to Raise New Grounds*

Defendants contend that Clipper's motion, without affidavits, advances no new grounds for vacating the judgment.[11] A motion which simply rehashes arguments heard at trial, defendants contend, does not properly lie under 59(e). *Assuming arguendo* that Clipper's 59(e) motion raises no new grounds, it nevertheless constitutes a proper 59(e) motion.

Rule 59(e) provides a mechanism by which a trial judge may alter, amend, or vacate a judgment. *See Foman* v. *Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process. As noted by this court in *United States* v. *Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979): "Errors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures and without thorough briefing by the parties. A motion for reconsideration may, in some instances, avoid the necessity of an appeal."[12] Clipper's motion

11. The defendants cite *Durkin* v. *Taylor*, 444 F.Supp. 879, 889-90 (E.D.Va.1977); *Erickson Tool Co.* v. *Balas Collet Co.*, 277 F.Supp. 226, 234 (N.D.Ohio 1967), *aff'd.*, 404 F.2d 35 (6th Cir. 1968); *Chastain* v. *Kelley*, 510 F.2d 1232, 1238 n.7 (D.C. Cir.1975), for the proposition that a 59(e) motion is not proper if it advances no new grounds in seeking to vacate a judgment. None of these cases involved the question of whether the motion tolled the running of time to file notice of appeal. All were concerned with whether the motion should have been granted. That is not at issue here. Furthermore, the position of these cases, in holding that a 59(e) motion must raise new grounds, is questionable. There is much authority to the contrary. *See Dove* v. *Codesco*, 569 F.2d 807, 809 (4th Cir. 1978); *Sonnenblick Goldman Corp.* v. *Norwalk*, 420 F.2d 858, 859 (3d Cir. 1970); *Parks* v. *"Mr. Ford"*, 68 F.R.D. 305 (E.D.Pa.1975).

12. This Circuit, in determining whether a motion for a new trial was timely, noted in dictum: "It is true that the motion for an extension of time

(footnote continued on following page)

enabled the trial judge to reconsider the validity of his judgment, and to vacate or alter it as he saw fit. As such, it was valid as a 59(e) motion.[13] Since Clipper filed its Notice of Appeal within 30 days after the district judge denied its Rule 59(e) motion, we therefore have jurisdiction, pursuant to Rule 4(a), to review the order granting summary judgment for defendants.

STANDARD OF REVIEW

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Gaines* v. *Haughton,* 645 F.2d 761, 769-70 (9th Cir. 1981). All facts and inferences drawn therefrom must be viewed in the light most favorable to the non-moving party. The moving party has the burden to establish the non-existence of any triable issue of fact. The defendants, here, established the nonexistence of a material issue of fact by making several admissions for the purposes of the motion. In their memorandum accompanying the motion, the defendants made the following admissions:

> For the purposes of this motion, the court may assume the existence of the conspiracy alleged in Clipper's interrogatory responses. It may further assume that everything was done that Clipper says was done to further that conspiracy.

(footnote continued from previous page)

within which to file a motion for new trial stated no grounds for which a new trial would be sought; but the fact that this motion, considered as an inartfully drawn motion for new trial was so defective that it could not properly be granted, would not serve to render it non-existent. This court has held that in order to suspend the running of the 30-day appeal period allowed by Rule 73(a) a motion for new trial need not be granted or even grantable." *Yanow* v. *Weyerhaeuser S.S. Co.,* 274 F.2d 274, 283 (9th Cir. 1959) (en banc), *cert. denied,* 362 U.S. 919, 80 S.Ct. 671, 4 L.Ed.2d 739 (1960).

Under this liberal approach, Clipper's motion was clearly sufficient to toll the time for filing a Notice of Appeal.

13. Because we hold that the record before the trial judge at the time the summary judgment was granted did *not* support that judgment, we need not consider the late filed affidavits in reaching our holding. Therefore, defendants' contention that the late filed affidavits could not be used to support reversal of summary judgment need not be considered.

> Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. Such an agreement would be perfectly lawful and immunized from antitrust liability.
>
> This court may assume for purposes of this motion that the object behind each of the protests was just what Clipper says it was—that the defendants who filed them were simply trying to eliminate or destroy competition.

The defendants, not once but three times, expressly represented to the district court that it could "assume for the purposes of this motion" that they had done exactly what Clipper alleged in its complaint. Their consistent position was that as a matter of law, the conduct alleged in the complaint did not state a legally-cognizable claim for damages under the antitrust laws. Therefore, we need only decide whether the district court correctly determined that, under the facts alleged, Clipper's antitrust claims were barred as a matter of law. As the district court recognized in its order granting summary judgment for the defendants, "[w]ith regard to the motions for summary judgment, the issues are purely legal ones."[14]

THE MERITS

As noted above, Clipper alleged in its complaint three ways in which the defendants' protests to the ICC constituted antitrust violations. First, the protest was alleged to be a direct

14. Ordinarily, the proper mode of testing the legal sufficiency of the allegations of a complaint is by way of a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). Such a motion can be made at any time, and normally will be made before any substantial discovery has been conducted. However, where, as here, evidence outside the record is submitted to and not excluded by the district court, any such motion must be disposed of by way of the summary judgment procedures specified in Rule 56(c). See Fed.R.Civ.P. 12(b).

interference with competitive activity, and a sham protest not immune under the *Noerr-Pennington* doctrine. Second, in protesting to the ICC, defendants allegedly furnished false information to the ICC, Clipper's business [sic]. Lastly, defendants' protest was simply an act in furtherance of an independent rate-fixing violation of the antitrust laws.[15]

I. THE PROTESTS AND NOERR-PENNINGTON IMMUNITY

Defendants contend that the district court properly found that the protests before the ICC were immunized from antitrust liability because of the *Noerr-Pennington* doctrine. Under the *Noerr-Pennington* doctrine, bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions are immune from antitrust liability. *See* 7 von Kalinowski, Antitrust Laws and Trade Regulation § 46.04 (1980). If the purported effort to influence or obtain government action is in reality only an attempt to interfere with the business relationships of a competitor, however, the activity does not enjoy antitrust immunity. *Noerr*, 365 U.S. at 144, 81 S.Ct. at 533.

The evolution of *Noerr-Pennington* immunity, and its concomitant sham exception, begins in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81

15. In a short order granting RMMTB's motion for summary judgment, the district court held: (1) Clipper's "claim, insofar as it is based on defendants' protests before the Interstate Commerce Commission, is barred by the ..." *Noerr-Pennington* doctrine. "Plaintiff's attempt to invoke the 'sham' exception to that immunity... is... foreclosed by the narrow reading of that exception announced in *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*...." The district court continued: "Furthermore, plaintiff's damage claims, which rest on assumptions as to action that would have been taken by the ICC in the absence of defendant's alleged antitrust violations are barred by *Keogh* v. *Chicago & N. W. Ry. Co.*..." The district court order did not individually consider the viability of the theories alleging that the furnishing of fraudulent information constituted an antitrust violation and that the protest was simply part of an independent antitrust violation.

S.Ct. 523, 5 LEd.2d 464 (1961).[16] In *Noerr*, truck operators and their trade association sued railroads, an association of presidents of those railroads, and a public relations firm alleging the defendants conspired to restrain trade in violation of §§ 1 and 2 of the Sherman Act. Specifically it was alleged that the defendants engaged in a "publicity compaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." *Id.* at 129, 81 S.Ct. at 525.

The defendants argued that their activities could not create liability under the Sherman Act when they were only trying to inform the public and the legislature of certain facts. The Supreme Court agreed, noting "that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135, 81 S.Ct. at 528. The Court held that even if the defendants' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers' business, the immunity remained. "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.* at 139, 81 S.Ct. at 530.

In this same case the Court also recognized that a sham attempt to influence governmental action would not be immune: "There may be situations in which a publicity campaign,

16. An analysis of cases dealing with the *Noerr-Pennington* doctrine is subject to the following caveat:

> [E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 579 [45 S.Ct. 578, 583, 69 L.Ed. 1093] (1925).

ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144, 81 S.Ct. at 533.

The antitrust immunity established in *Noerr* for bona fide attempts to influence governmental action was reaffirmed in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In *Pennington,* a small coal company cross-claimed against the UMW, trustees, and certain large coal operators, alleging that they had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act. The Union and large companies agreed upon steps to exclude the marketing, production and sale of non-union coal. Together they successfully approached the Secretary of Labor to obtain a minimum wage requirment for employees of contractors selling coal to the TVA, making it difficult for small companies tc compete in TVA term contracts. Other executive action was sought and obtained.

The Court held that the acts seeking governmental action were immune from antitrust liability. The Court noted that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Id. at 670, 85 S.Ct. at 1593. "[T]he legality of the conduct 'was not at all affected by any anti-competitive purpose it may have had,' . . . even though the 'sole purpose in seeking to influence the passage and enforcement of laws was to destroy . . . competitors. . . .'" Id. at 669, 85 S.Ct. at 1593.

In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Court extended the *Noerr-Pennington* doctrine to attempts to influence administrative and judicial (adjudicatory) bodies, while holding that a cause of action had been stated under the "sham" exception. In *Trucking,* a group of highway carriers

operating in California sued a group of interstate highway carriers, alleging violations under § 4 of the Clayton Act. The first group of highway carriers alleged that the second group conspired to institute state and federal proceedings to resist and defeat applications by the first group to acquire operating rights or to transfer or register those rights.

The *Trucking* Court held that the *Noerr-Pennington* doctrine doctrine protects genuine efforts to influence adjudicatory bodies. The Court noted, however, that the allegations in that case gave rise to a cause of action under the sham exception to that doctrine. The Court noted that allegations that proceedings were instituted without probable cause, and regardless of merit, state a cause of action which falls within the exception to *Noerr*. Although the Court did not set forth the parameters of the sham exception, it did list *examples* of activity which might come within the exception.[17]

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17. Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-77, 86 S.Ct. 347, 349-50, 15 L.Ed.2d 247. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Cabide & Carbon Corp.*, 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777; *Harman* v. *Valley National Bank*, 339 F.2d 564 (CA 9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851 (CA 9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression." 404 U.S. at 512-13, 92 S.Ct. at 613.

In *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), *on remand,* 360 F.Supp. 451 (D.Minn. 1973), *aff'd,* 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974), Otter Tail Power monopolized the distribution of power to various communities. Otter Tail prevented those communities from creating their own marketing organizations by instituting and supporting litigation designed to prevent or delay the establishment of the municipal power systems. The United States sued Otter Tail under the antitrust laws. Rendering its decision before *Trucking Unlimited* had been decided, the district court held that Otter Tail did not enjoy *Noerr* immunity, because that immunity did not extend to efforts to influence the administrative or judicial process.

The Supreme Court remanded in light of *Trucking Unlimited,* noting that although *Noerr* immunity might be applicable in this case, so might the sham exception. *Id.* at 380, 93 S.Ct. at 1031. On remand, the district court held that Otter Tail's conduct fell within the sham exception.[18] 360 F.Supp. 451 (D.Minn. 1973). The Supreme Court summarily affirmed. 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974).

The defendants in the instant case argue on appeal that their conduct does not fall within the sham exception because the evidence shows the conduct was intended to influence governmental action. At the district court, however, the defendants admitted that for the purposes of this motion "the object behind the protests [was] . . . simply . . . to eliminate or destroy competition."

It is unquestionably true, as defendants assert, that *Noerr-Pennington* confers antitrust immunity for conduct *genuinely* intended to influence governmental action. Whether something

18. The district court wrote: "[T]he repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly . . . the litigation comes within the sham exception to the Noerr doctrine as defined by the Supreme Court in *California Transport* . . . ." 360 F.Supp. at 451 52 [sic].

is a genuine effort to influence governmental action, or a mere sham, is a question of fact. The facts here show, however, that this conduct is not the type that is entitled to immunity; it is not in fact conduct intended to influence governmental action.

Clipper, for the purposes of the summary judgment motion, has sufficiently shown that defendants' protests were spurious, baseless, and prosecuted without regard to their merit, intended only to delay competitive action, not to influence governmental action. The defendants, in advance of Clipper's filing reduced tariffs, agreed through RMMTB to institute proceedings before the ICC for the purpose of restricting and prohibiting competition from any freight forwarders. In furtherance of this agreement, the defendants—particularly RMMTB—would automatically protest any forwarder tariff, regardless of the rate's legality or competitive justification. These protests were put forward in the interest of maintaining parity between the rates of freight forwarders and motor carriers and were prosecuted without regard to the merits of the protest. Therefore, the defendants' intent, admitted for the purpose of their motion, was not to induce favorable administrative action from the ICC, but rather to saddle Clipper with such onerous regulatory and administrative burdens that it would be forced to withdraw the rates.

The defendants contend on appeal that their protests were filed and prosecuted with the intent of influencing governmental action. The defendants contend that the undisputed facts establish that the protests were efforts to influence governmental action. We disagree.

The fact that their intent was to prevent price competition by Clipper is not determinative. Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition. However, Clipper sought to bring its claims within the "sham" exception by contending that the defendants protested rates automatically, without regard to merit or possible success before the

ICC, and therefore without any intent to induce favorable action by the ICC. These allegations fall within the sham exception as a matter of law. Baseless protests, instituted without regard to merit, are "nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr,* 365 U.S. at 144, 81 S.Ct. at 533.

On remand, Clipper will need to establish the facts supporting this theory. However, we note that while the success or failure of the protests is not singularly determinative of a party's intent, this Circuit regards such success or failure as indicative of a party's intent. *See Ernest W. Hahn, Inc.* v. *Codding,* 615 F.2d 830 at 841 n.13 (9th Cir. 1980). Here, defendants' protests to Clipper's reduced rates were unsuccessful. This, combined with the assumed facts as to the defendants' intent, is enough to prevent the defendants from being cloaked with *Noerr* immunity as a matter of law.

TRUCKING UNLIMITED'S APPLICATION OF THE SHAM EXCEPTION

Defendants' more substantial contention is that *Trucking Unlimited* itself precludes application of the sham exception in this case. Defendants contend that to fall within the sham exception, *Trucking* requires that the alleged misconduct (1) consist of a pattern of repetitive claims; (2) be baseless; and (3) bar access to the governmental body. We disagree. Although all of these elements can be found under the peculiar facts of *Trucking Unlimited,* nothing in *Trucking Unlimited* requires that all of these elements be present for the sham exception to apply.

PATTERN OF REPETITIVE CLAIMS

Defendants claim that because they protested only one tariff, Tariff 55, the sham exception does not apply and they retain *Noerr* immunity. Assuming that defendants' acts con-

stituted only one protest, we do not find any merit in this contention.[19]

An examination of the theoretical underpinnings of *Noerr-Pennington* and the sham exception indicates that it is unnecessary to allege and prove more than the institution of a single suit or protest to invoke the sham exception.[20] The *Noerr-Pennington* doctrine is itself a judicially created exception to the application of the antitrust laws based on the first amendment.[21] First amendment protection is extended and application of the antitrust laws suspended because a legitimate

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19. Whether defendants' protests constitute one or multiple claims is a matter of interpretation. There is one basic tariff—Tariff 55—involved here. During the course of the investigation, however, Tariff 55 was modified by Clipper many times. After each modification the defendants lodged a new protest. Each protest was necessary to preserve the initial protest, or else the newly revised Tariff 55 would go into effect, mooting the prior protest. Whether this constitutes one or multiple claims in unclear. We need not reach that question because we find the sham exception applicable even if there is only a single claim involved.

20. The conduct which the *Trucking Unlimited* Court held to fall within the sham exception constituted a pattern of repetitive claims. The defendant highway carriers in *Trucking Unlimited* continually instituted state and federal proceedings to defeat applications by other highway carriers to acquire operating rights or to transfer or register those rights. In holding that a cause of action under the sham exception was stated, the Court referred to "a pattern of baseless, repetitive claims [which] may emerge [and lead] the factfinder to conclude that the administrative and judicial process have been abused." 404 U.S. at 513, 92 S.Ct. at 613.

21. *Noerr* advanced at least three arguments for the exception, but did not clearly adopt any. First, the Court noted that there is an "essential dissimilarity" between agreements to seek government action and those agreements traditionally condemned by the antitrust laws. This essential dissimilarity, "even if not itself conclusive on the question of the applicability of the [antitrust laws], does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint." 365 U.S. at 136-37, 81 S.Ct. at 528-29.

Second, the Court noted that finding liability for legitimate efforts to effect [sic] government "would substantially impair the power of government to take actions through its legislative and executive that operate to restrain trade." *Id.* at 137, 81 S.Ct. at 528. The nature of a representative government requires that the government act on behalf of the people, and to make representation work, requires that the people indicate their wishes to the government.

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effort to influence government action is part of the guaranteed right to petition. *Trucking Unlimited,* 404 U.S. at 510, 92 S.Ct at 611.

The sham exception, on the other hand, reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the "sham" petitioning activity is not entitled to first amendment protection, *because it is not an exercise of first amendment rights.*

If the activity is not genuine petitioning activity, the antitrust laws are not suspended and continue to prohibit the violating activities. Because application of the antitrust laws is not suspended, it will prohibit sham activity, whether that activity consists of single or multiple sham suits. This analytical framework does not permit a conclusion that single sham suits are protected under *Noerr.*[22]

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Finally, the *Noerr* Court noted that finding liability for legitimate efforts to influence government would raise serious constitutional questions. The right to petition government is guaranteed in the first amendment. Therefore, it cannot be infringed by a statute, and the court will not "lightly impute to Congress an intent to invade these freedoms." *Id.* at 138, 81 S.Ct. at 530.

The Court in *Pennington* was no more definite about the basis for the exception.

The *Trucking Unlimited* Court continually spoke to the first amendment right to petition, while extending *Noerr* to attempts to influence courts and administrative bodies, i.e., "The right of access to the court is indeed but one aspect of the right of petition." 404 U.S. at 510, 92 S.Ct. at 611. "Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment." *Id.* at 513, 92 S.Ct. at 613.

22. The existence of multiple suits will undoubtedly make it easier to prove that a party did not have the requisite legitimate intent to influence government that is necessary to invoke the first amendment protections of *Noerr.* We are not, however, concerned here with the ultimate ability of a plaintiff to succeed at trial. Rather, we are concerned with a plaintiff's ability

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Indeed, the Court in *Trucking Unlimited* mentioned several types of activity that could constitute antitrust violations, despite the fact that only single instances of conduct are involved. Specifically, the Court mentioned "[u]se of a patent obtained by fraud to exclude a competitor from the market," and "bribery of a public purchasing agent." 404 U.S. at 512-13, 92 S.Ct. at 612-13.[23] These examples involve only a single act, yet the Court notes that they are prohibited by the antitrust laws. Given this language, and absent any contrary indication by the Supreme Court, [24] there is no reason to believe that the Court

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to avoid summary judgment. As to proof at trial, it is entirely conceivable that the requisite sham intent can be proven when there is only a single sham suit.

23. We recognize that the fraud and bribery mentioned in *Trucking Unlimited* do not involve the petitioning activity that is the heart of the *Noerr-Pennington* doctrine. Defendants have not, however, presented any basis for finding this distinction relevant. The *Trucking Unlimited* Court itself treated the fraud and bribery as analogous to the sham petitioning activity for the purposes of antitrust liability.

24. In *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977), the Supreme Court was given the opportunity to decide whether the sham exception was applicable in a case in which only a single suit was involved. The Supreme Court, in a three-opinion decision, avoided the question. *Vendo* involved a federal litigant attempting to enjoin state litigation, on the grounds that the single state suit constituted an antitrust violation. A three-justice plurality opinion refused to enjoin the state suit, holding an injunction was improper under the anti-injunction statute. The two-justice concurring opinion wrote that an injunction was improper because the single suit would not be sufficient to constitute a cause of action under the sham exception. Four dissenters wrote that the suit was not barred by the anti-injunction statute, and that a single claim was enough to constitute a cause of action under the sham exception. The dissent noted, as we noted above, that the *Trucking Unlimited* Court itself wrote that in certain cases single acts constituted antitrust violations. Moreover, the dissent found no language in *Trucking Unlimited* which would bar a claim based on a single suit. We are convinced by the dissent.

Lower courts, in cases preceding *Vendo Co.* v. *Lektro-Vend Corp.*, have split on whether repetitive suits are necessary to have an actionable antitrust violation. *Compare Huron Valley Hosp., Inc.* v. *City of Pontiac*, 466 F.Supp.1301, 1314 (E.D.Mich.1979); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 462 F.Supp. 1072, 1103 (N.D.Ill. 1978); *Mountain Grove Cemetery Assn.* v. *Norwalk Vault Co.*, [1977], 428 F.Supp. 951

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intended to extend the sham exception only to cases involving repetitive claims.[25]

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(D.Conn.1977); *Central Bank of Clayton* v. *Clayton Bank*, 424 F.Supp. 163, 167 (E.D.Mo.1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53, L.Ed.2d 1095 (1977) (all requiring multiple, repetitive suits), *with Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530, 543 n.6 (5th Cir. 1978), *cert. denied, sub nom., Palmer* v. *Feminist Women's Health Center*, 444 U.S. 924, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979); *Colorado Petroleum Marketers Assn.* v. *Southland Corp.*, 476 F.Supp. 373, 377-78 (D.Colo.1979); *First Nat'l Bank of Omaha* v. *Marquette Nat'l Bank* [1980], 482 F.Supp. 514 (D.Minn.1979); *Technicon Medical Information Systems Corp.* v. *Green Bay Packaging Inc.*, [1980] 480 F.Supp.124 (E.D.Wis.1979); *Cyborg Systems, Inc.* v. *Management Science America, Inc.*, [1978] Trade Reg.Rep. (CCH) Trade Cas.¶ 61,927, at 73,918 (N.D.Ill.1978); *Associated Radio Serv.* v. *Page Airways, Inc.*, 414 F.Supp. 1088 (N.D.Tex.1976) (all holding that a single suit is sufficient).

25. The commentators agree with this interpretation. *See* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi.L.Rev. 80, 110 (1977) ("The touchstone of the traditional sham exception—the absence of a genuine intent to influence the government—suggests that although repeated lawsuits are highly probative, *they are not necessary to constitute a sham.*") (emphasis added); Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L.Rev. 39, 55 56 [sic] (1980) ("The 'pattern of baseless repetitive claims' language of *California Motor Transport* will be treated by some as making multiple sham suits a prerequisite for antitrust liability. However, the better analyses will be those which look behind this language to the precedents relied upon in *California Motor Transport* and which, like Justice Stevens' dissent in *Lektro-Vend*, view those words as an 'illustration' of an antitrust violation and not a minimum standard. The single sham suit can be a very significant restraint of trade or act in furtherance of monopolization, and it should be prohibited by the Sherman Act. More importantly, . . . the constitutional guarantee of the right of petition which underlies *Noerr-Pennington* immunity protects only legitimate suits and not sham litigation, whether that litigation consists of one knowingly baseless complaint or many.") Our view that a single sham action is sufficient is not inconsistent with the holding in *Ad Visor, Inc.* v. *Pacific Telephone & Telegraph Co.*, 640 F.2d 1107 (9th Cir. 1981). In *Ad Visor*, we stated "Multiplicity, by itself, does not vitiate the *Noerr-Pennington* protections." Id. at 1109.

In support of this view, we relied upon the following language from Justice Blackmun's concurring opinion in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 33 L.Ed.2d 1009 (1977): "Since I believe that federal courts should be hesitant indeed to enjoin ongoing state court proceedings, I am of the opinion that a pattern of *baseless*, repetitive claims or *some*

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Given the theory supporting both the *Noerr-Pennington* doctrine and the sham exception, and absent any contrary indication from the Supreme Court, we hold that a single suit, or in this case a single protest, is sufficient to invoke the sham exception.

BASELESS CLAIMS

Defendants contend that to come within the sham exception, plaintiff must allege and show that the claims prosecuted were baseless. Defendants claim that since their claims were not baseless, the grant of summary judgment is proper. We disagree. Assuming that baseless claims must be shown, the record before the district court reveals that the defendants' protests of Tariff 55 were baseless.

The defendants admitted *arguendo* that their protests were filed automatically and without regard to merit. This establishes that defendants' protests were baseless for the purposes of the motion. Indeed, the fact that defendants lost all protests establishes a sufficient showing of baselessness for the purposes of a summary judgment motion. This is certainly sufficient to present a triable issue of fact.

ACCESS DENIAL

Relying again on *Trucking Unlimited*, defendants contend that Clipper cannot invoke the sham exception unless it establishes that defendants' actions deprived Clipper of access to the ICC. Defendants claim that because Clipper was successful before the ICC in fighting the protests, and also made numerous filings with the ICC during the protest period, Clipper was not deprived of either actual or meaningful access to the ICC. Defendants' contention is erroneous.

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equivalent showing of grave abuse of the state courts must exist before an injunction would be proper." 433 U.S. at 644 (emphasis added).

Thus, it is not the number of claims which is controlling, but whether the evidence shows that the claim or claims filed constitute an abuse of process. Where the facts are in dispute, this is a question for the trier of fact.

The defendants claim that *Trucking Unlimited* requires access barring as a prerequisite to application of the sham exception. In *Trucking Unlimited* the Court noted that the plaintiffs alleged, in establishing a sham claim, that defendants "petitioning" activity denied them free and unlimited access to administrative and judicial tribunals. 404 U.S. at 511, 92 S.Ct. at 612. The Court, in holding that a cause of action was stated under the sham exception, based its decision on alternative grounds—access barring and also the fact that the administrative and judicial process had been abused. *Id.* at 513, 92 S.Ct. at 613. In *Trucking Unlimited,* the concepts of access barring and abuse of judicial process were treated interchangeably because the defendants' intervention in the administrative process in that case involved both. Subsequent decisions of the Supreme Court indicate that the access-barring language of *Trucking Unlimited* referred only to the particular circumstances in that case, and did not establish access barring as a prerequisite to a sham exception suit.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), *on remand,* 360 F.Supp. 451 (D.C. Minn.1973), *aff'd mem.* 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974), the Court held that a cause of action under the sham exception was made out in the absence of any allegation of access barring. The *Otter Tail* defendants used litigation to suppress competition, and in fact gave the plaintiffs greater access to courts by instituting lawsuits. *Otter Tail* indicates that the term "access barring" refers only to one type of abuse of judicial or administrative process and that "access barring" need not be present for the maintenance of a suit under the sham exception.[26]

26. In the following cases, the Court indicated that sham claims were appropriate, even though access barring was absent. *See Vendo Co.* v. *Lektro-Vend Corp.,* 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (all three opinions assume the filing of baseless lawsuits with the purpose of elimination of competition could constitute an antitrust violation) ("sham litigation in state courts may constitute an antitrust violation") (plurality opinion) *Id.* at 635 n.6, 97 S.Ct. at 2889 n.6; (pattern of baseless repetitive claims may

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Defendants contend that despite the Supreme Court's decision in *Otter Tail,* access barring is a prerequisite to a sham suit in the instant case. They contend that (1) the cases where access barring was not required are distinguishable from the instant case, because in those cases there was no administrative body involved to which access could be denied. Rather, in those cases the petitioning activity was first directed to courts. In this case, however, there was an administrative body (the ICC) to which access could be denied; and (2) *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977), requires access barring as an element of a sham claim. We are not persuaded by either contention.

Neither *Otter Tail* nor any subsequent Supreme Court case indicates that access barring is required when the petitioning activity is directed towards an administrative body although it is not required if the petitioning is directed to the courts. Moreover, such a holding seems senseless. The same dangers that the antitrust laws seek to prohibit flow from instituting sham administrative proceedings as flow from instituting sham judicial proceedings. Harassment of a rival through an administrative proceeding may have the same anticompetitive effect as harassment through the court system. We therefore see no reason to distinguish between cases in which there is primary resort to an administrative body and cases where the primary

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constitute antitrust violation) (concurring opinion) *Id.* at 643-44, 97 S.Ct. at 2893-94; ("illegal use of state court litigation as a method of monopolizing or restraining trade is . . . a violation of the antitrust laws") (dissenting opinion) *Id.* at 653, 97 S.Ct. at 2898; *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S 389, 405, 98 S.Ct. 1123, 1132, 55 L.Ed.2d 364 (1978) (anticompetitive litigation in the courts can constitute antitrust violation); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.,* 439 U.S. 96, 110 n.15, 99 S.Ct. 403, 412 n.15, 58 L.Ed.2d 361 (1978) ("Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws").

resort is to the court system. In fact, *Trucking Unlimited,* when discussing the dangers of abuse of process, groups judicial and administrative process together. 404 U.S. at 513, 92 S.Ct. at 613 ("the administrative and judicial processes have been abused").

Defendants also suggest that in *Franchise Realty* this court held that access barring is a necessary element of a sham claim. Defendants, however, ignore the most recent pronouncement of this circuit. In *Ernest W. Hahn, Inc.* v. *Codding,* 615 F.2d 830 (9th Cir. 1980), this court found a cause of action under the sham exception was stated despite the absence of access barring. The *Hahn* court stated:

> It has been suggested that *Franchise Realty* requires a showing of some activity other than the alleged abuse of process and perhaps a showing that the plaintiff has been barred from meaningful use of the agency or tribunal. *See Handgards, Inc.* v. *Ethicon, Inc.,* 601 F.2d 986, 998 (9th Cir. 1979) (Kennedy, J. concurring), *cert. denied,* 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980). While *Franchise Realty* may be read in this manner . . . in view of what the decision itself says when discussing *Otter Tail* and the later Supreme Court decision in *Vendo,* we decline to follow this interpretation under the alleged facts in this case." 615 F.2d at 841 n.14.[27]

Defendants also contend that we must require proof of access barring here if "the *Noerr-Pennington* doctrine is to protect protest activities at all." Defendants claim that if we did not require access barring, every competitor who was adversely

27. *Franchise Realty* is very different from the instant case. In *Franchise Realty* the defendants opposed plaintiffs' applications for building permits. The body which acted on the permits was "as much a political as an adjudicatory body." 542 F.2d at 1079. The defendants were successful in their opposition. Here, in contrast, the defendants opposed the plaintiff's applications in a pure adjudicatory body. As the *Trucking* court noted, activity which is acceptable before a political body is not necessarily acceptable before an administrative or judicial body. *See* 404 U.S. at 513, 92 S.Ct. at 613. Moreover, in the instant case, the defendants' protests uniformly failed.

affected by the filing of a protest would file an antitrust suit against the protesting party. This increased litigation, defendants claim, would deter the exercise of first amendment rights. We disagree.

The Supreme Court in *Otter Tail* held that a sham exception cause of action was stated, despite the absence of access barring. We see no reason to hold otherwise here. All laws create the possibility of litigation. Congress, in its wisdom, enacted the antitrust laws. We have no cause here to second guess the judgment of Congress. Defendants have not shown how their first amendment rights have been infringed by the antitrust laws, nor have they presented any reason to believe that our holding will adversely affect the future exercise of first amendment rights. To prove an antitrust violation under the sham exception, a plaintiff must prove the usual elements of any antitrust violation in addition to proving that a defendant's actions that ostensibly appear as petitioning activity were not genuine efforts to influence governmental action; rather they were nothing more than an attempt to interfere directly with the business relationships of a competitor. This is a heavy burden. Neither the first amendment nor the antitrust laws require that we make it any heavier by adding the requirement of access barring.

We have found no precedent nor any reason to require access barring before the sham exception can be invoked.[28] Thus, we conclude that to invoke the sham exception, some

28. The commentators have also agreed with our interpretation.

See R. Bork, The Antitrust Paradox, 354 (1978) ("Certainly, in a proper case, a proved intent not to bar competitors from the courtroom but, by the litigation of baseless claims, to bar them from a market or to delay their entry should suffice for a violation of the Sherman Act"); Areeda & Turner, Antitrust Law ¶ 203b at 41 (1978) ("Because the would-be competitors [in *Trucking Unlimited*] had first to obtain a license from an administrative agency, the Court spoke of defendants' alleged misbehavior as revealing 'a purpose to deprive the competitors of meaningful access to the agencies and courts.' But harassment of rivals through administrative adjudication would seem equally reprehensible and anti-competitive whether or not the actual or potential rival would himself be obliged to seek a license to enter the market in question.")

abuse of process, although not necessarily access barring, must be alleged. Because it was sufficiently alleged here, the summary judgment was improper.

FRAUD

In its amended complaint Clipper alleged that the defendants provided the ICC with fraudulent information in connection with the rate protests, and that therefore the defendants were liable for treble damages under the Sherman Act.[29] Specifically Clipper claimed that the defendants, "[t]o give

29. The defendants, in a footnote in their brief, also claim that the action for fraud is barred by the statute of limitations. Section 4B of the Clayton Act, 15 U.S.C. §15b, provides the applicable four-year statute of limitations. Defendants contend that the first fraud claim was asserted in an amended complaint six years after the alleged fraud occurred, and five years after the action was filed, and is accordingly barred by the four-year statute of limitations in the Clayton Act. Even if we assumed the truth of all defendants' allegations, we would not agree with their conclusion that the fraud claim is barred by the statute of limitations.

Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Under the relation back doctrine of Rule 15(c), the allegations of a new theory in an amended complaint will not be time barred if the theory involves the same transaction, occurrence, or core of operative facts involved in the original claim. *See 3 Moore's Federal Practice* ¶ 15.15[3], at 15-194 (3d ed. 1980); Wright & Miller, 6 Federal Practice and Procedure § 1496 (1971). In the instant case, the initial complaint alleged antitrust violations involving the defendants' protests to the ICC. The fraud claim in the amended complaint also alleged antitrust violations arising from the protests. The *protests involve a single transction or occurrence.* Therefore, the claims involving fraud *relate back* to the filing of the first complaint, and are not time barred.

We are mindful that the relation back doctrine of Rule 15(c) is to be liberally applied. Moreover, as recognized by the Fifth Circuit: "This liberality is particularly persuasive in antitrust suits where there is ample opportunity for discovery and other pretrial procedures." *Woods Exploration & Producing Co., Inc.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1300 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972).

Here, the initial complaint clearly put defendants on notice that their conduct involving the protests was being challenged in court; the purposes of the statute of limitations were satisfied. In the absence of any evidence of prejudice to defendants caused by the late filing of the fraud claim, there is no reason to find it time barred.

their sham protests the appearance of merit and thereby subvert the purpose of § 15a(3)[30], . . . knowingly understated their costs; they knowingly overstated the forwarders' costs; they deliberately misrepresented to the ICC that Clipper's charges were substantially below defendants' charges and therefore constituted 'destructive competition' in violation of national transportation policy; and they made countless other misrepresentations of both fact and law . . . . "

The district court's order did not specifically deal with the fraud issue; hence it did not address a rule of law known as the *Walker Process* doctrine, which provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends. We therefore remand to the district court for a determination of whether the defendants' actions constituted an antitrust violation in that they perpetrated fraud on an administrative agency, for predatory ends.

Imposing antitrust liability for supplying fraudulent information in an administrative proceeding derives from *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965). In *Walker Process* the question was "whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under § 2 of the Sherman Act,

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30. 49 U.S.C. §15a(3), recodified as 49 U.S.C. §10704(d), provides:

> In a proceeding involving competition between carriers of different modes of transportation . . . the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy. . . .

Section 15a(3) has been held to require the protesting carrier mode to establish that it has the inherent cost advantage. This may be shown by comparing fully allocated costs and establishing that the proposed rate is below protestants' fully allocated costs. *See ICC* v. *New York, New Haven & Hartford R.R. Co.*, 372 U.S. 744, 83 S.Ct. 1038, 10 L.Ed.2d 108 (1963); *American Commercial Lines Inc.*, v. *Louisville & Nashville R.R. Co.*, 392 U.S. 571, 88 S.Ct. 2105, 20 L.Ed.2d 1289 (1968).

and therefore subject to a treble damage claim by an injured party under § 4 of the Clayton Act." *Id.* at 173, 86 S.Ct. at 348. The Supreme Court held that "the enforcement of a patent procured by fraud on the Patent office may be violative of § 2 . . . provided the other elements necessary to a § 2 case are present." *Id.* at 174, 86 S.Ct. at 348[31]

This Circuit has never clearly extended the *Walker Process* doctrine to cases not arising in a patent context.[32] We are directly presented with the issue. We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven.

As the Supreme Court noted in *Trucking Unlimited,* the adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the

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31. The *Walker Process* doctrine is not limited to fraud on the Patent Office. The fact that *Walker Process* provides a rule of general applicability was intimated in *Trucking Unlimited,* in which Justice Douglas wrote that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." 404 U.S. at 513, 92 S.Ct. at 613.

32. *See, e.g., Mt. Hood Stages, Inc.* v. *Greyhound Corp.,* 555 F.2d 687, 696 (9th Cir. 1977), vacated and remanded on other grounds 437 U.S. 322, 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978).

> The lengthy [jury] instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* . . . and *California Motor Transport Co.* v. *Trucking Unlimited.* . . . *Greyhound* argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. . . . At most . . . the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.
>
> When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, *we do not believe they present even this issue.* (emphasis added) (citations omitted).

parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws. *See, e.g., Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 275-80 (D.C. Cir.1972).

Because of the admissions made in defendants' memorandum accompanying its motion for summary judgment, we must assume as proven that the defendants knowingly provided the ICC with fraudulent information in connection with their rate protests in determining whether a claim based on the furnishing of fraudulent information is stated sufficiently to withstand summary judgment. Clipper's specific allegations which as judicial admissions are to be accepted as proven are set forth above. We find that these assumed facts are sufficient to establish a triable cause of action under the antitrust laws.

Defendants contend, however, that no cause of action based on fraud is stated because: (1) their acts and statements are immune under the first amendment; (2) the ICC ultimately found for Clipper and therefore the defendants' acts did not defraud the ICC; and (3) access barring is required and Clipper was not denied access to the ICC. We are not persuaded by any of these contentions.[33]

There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements. For example, defamatory statements can be made the basis for liability. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11

33. Defendants also contend that Clipper's claim of fraud is refuted in the record, because the ICC began its investigation into Clipper's Tariff 55 before defendants made their fraudulent representations. Even if this is true, the fraud may have resulted in a longer, more in depth, investigation. We express no opinion here on the ultimate merits of the fraud claim. We are holding here only that a cause of action for fraud is presented—whether it can be proven is not our concern at this point.

L.Ed.2d 686 (1964). 18 U.S.C. § 1001 imposes criminal penalties for knowingly and wilfully concealing or misrepresenting material facts before any department or agency of the United States. Courts uniformly punish perjury. As the Supreme Court stated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974); "there is no constitutional value in false statements of fact." Contrary to defendants' assertions, there is simply no basis to hold that deliberately misrepresenting facts to an administrative body for anti-competitive purposes enjoys blanket first amendment protection.

Defendants contend that if first amendment protection is not extended to their statements, robust debate would be chilled. While we recognize that under certain circumstances allowing the imposition of liability for statements can hamper debate, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this possibility does not require that all such statements be immunized from liability. It may suggest that a court should adopt a stricter standard of proof, or certain additional elements should be required. *See id.* (interest in public debate requires that to establish defamation by media against public official, plaintiff show statement was made with knowledge of or reckless disregard for falsity). Regardless of degree of protection which might be found appropriate for protecting defendants' statements from antitrust liability, those limits have been exceeded here. Clipper claims defendants knew the falsity of their statements, and made those statements in a deliberate attempt to mislead a regulatory body. We can conceive of no stricter standard than that satisfied by the facts alleged by Clipper. We see no reason to extend first amendment protection here.

Defendants contend that no cause of action for fraud is stated because the ICC rejected defendants' arguments and found for Clipper, and therefore the ICC was not defrauded by the defendants. This analysis is deficient. First, neither *Walker Process*, nor subsequent cases, *see Israel* v. *Baxter Laboratories*,

466 F.2d 272 (D.C.Cir. 1972); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701 30 L.Ed.2d 736 (1972), *require* that the body on whom the fraudulent mistatements are pressed ultimately believe those statements. Moreover, the underlying theoretical basis of the *Walker Process* doctrine does not support such a narrow interpretation of the doctrine.

Walker Process recognizes that fraudulently supplying information can result in monopolization, and therefore violate the antitrust laws. The doctrine is not concerned with whether the body intended to be influenced by the information is ultimately defrauded; a cause of action is established so long as the elements of an antitrust claim are alleged and the violation is executed through fraudulently supplying information. Whether the body is ultimately defrauded by the information may affect the extent of the monopolization—and thus affect damages.

We find significant support for our findings in both policy and practice. Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies[34] and courts, however, rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations. The recognition, however, of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts.

34. We note that in an amicus brief the ICC has urged us to find that deliberate misrepresentations of material facts to the ICC will make out an antitrust claim if other elements of an antitrust claim are present. The ICC states that "many government agencies the size of the [ICC] have only a small staff to monitor the actions of litigants and must rely on the parties to tell the truth. Thus, a misrepresentation could go undected unless another party who becomes aware of the wrongdoing comes forward and reports it to public authorities. The incentive provided by treble damage recovery [of antitrust laws] would give parties a monetary inducement to bring to light such wrong-doing."

Moreover, we are not persuaded that Clipper should be deprived a remedy and defendants should be immunized from liability simply because Clipper was not denied access to the ICC. There is simply no basis for requiring a denial of access to the agency as a prerequisite for an antitrust claim for fraud. Defendants contend that both *Trucking Unlimited* and *Franchise Realty* require access barring in this context. Neither of these cases, however, involved claims arising from the furnishing of fraudulent information for predatory purposes. Moreover, *Otter Tail* establishes, as noted earlier, that an antitrust claim based on litigation can exist without access barring. The grant of summary judgment on this claim was not proper.

IV. OVERALL SCHEME

Clipper alleges, finally, that the defendants engaged in a rate fixing conspiracy, part of which involved defendants' protests to the ICC, and that this conspiracy constitutes a separate violation of the antitrust laws independent of any petitioning activity that might enjoy *Noerr* immunity. For several years the defendants engaged in a practice by which they refrained from offering lower rates to each other's customers. This practice was enforced by censure, and if necessary, by vigorous protests against competitive rate publications. Clipper contends that this conduct constitutes a horizontal conspiracy to fix prices and allocate the relevant market, *per se* violative of the Sherman Act. Moreover, defendants prosecuted deliberately false protests against Clipper's lower rates to enforce and protect their illegal price fix/customer allocation. Clipper thus contends that the defendants' prosecution of litigation in furtherance of their unlawful scheme constituted an antitrust violation, and the overall scheme was not excused by immunity provisions in the ICA nor *Noerr* immunity.

The defendants assert that § 5a of the ICA, 49 U.S.C. §5b, recodified as 49 U.S.C. § 10706, provides immunity for this conspiracy to fix rates. Furthermore, the defendants contend that the *Noerr-Pennington* doctrine protects petitioning activity whether or not that activity is in furtherance of an independent

antitrust violation. In its summary judgment order, the district court did not specifically consider the viability of this "overall scheme" contention.

An antitrust violation does not enjoy immunity simply because an element of that violation involves an action which itself is not illegal. In *Trucking Unlimited* the Court emphasized the existence of liability for antitrust violations, even though an integral part of the violation may involve otherwise legal and protected activity.

The court stated:

> Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by [competitors]. That right, as indicated, is part of the right to petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. 404 U.S. at 513-14, 92 S.Ct. at 613.

Similarly, we hold that when there is a conspiracy prohibited by the anti-trust laws, and the otherwise legal litigation is nothing but an act in furtherance of that conspiracy, general antitrust principles apply, notwithstanding the existence of *Noerr* immunity. In so holding we are acting consistently with the theoretical underpinnings of the *Noerr* doctrine. As we noted above, *Noerr* immunity is based on the first amendment right to petition and to seek to influence governmental action. *See Trucking Unlimited,* 404 U.S. at 510 12, 92 S.Ct. at 611 12 [sic]. When, however, the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity. As the Court noted in *Trucking Unlimited:*

> First Amendment rights may not be used as the means or the pretext for achieving "substantive evils". . . which the

> legislature has power to control. Certainly the constitutionality of the antitrust laws is not open to debate.... If the end result is unlawful, it matters not that the means used in violation may be lawful. 404 U.S. at 515, 92 S.Ct. at 614.

We agree. If Clipper can prove that the defendants engaged in activities which violated the antitrust laws, those violations do not become immune simply because the defendants used legal means—protests before the ICC—as a means to enforce the violations.

We find significant support for our holding in Supreme Court and circuit court decisions. *United States* v. *Singer Manufacturing Co.*, 874 U.S.174, 83 S.Ct. 1776, 10 L.Ed.2d 823 (1963), held that a cause of action under the antitrust laws was stated when an integral part of the violation was prosecution of patent infringement actions. In *Singer*, the defendants conspired to eliminate Japanese competition from the American sewing machine market. To eliminate this competition, the defendants assigned patents and prosecuted patent infringement actions against Japanese competitors. The Supreme Court held that this aggregation of patents and prosecution of infringement suits constituted an actionable violation of the antitrust laws.

The instant case is analogous to *Singer*. Here, the allegation is that the defendants conspired to fix rates and allocate customers, and used the protest mechanism of the ICC to further this conspiracy. Protests before the ICC are legitimate mechanisms for enforcing rights. Even if the protests to the ICC were legitimate, if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws.

This Circuit has embraced the *Singer* holding, at least in the context of patent infringement suits. In *Handgards, Inc.* v. *Ethicon, Inc.*, 601 F.2d 986, 994 (9th Cir. 1979), *cert denied*, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980), this court stated that:

> *Kobe* [*Kobe, Inc.* v. *Dempsy Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651 (1952)] and its progeny, among which is *Rex Chainbelt* [*Rex Chainbelt, Inc.* v. *Harco Products, Inc.* 512 F.2d 993 (9th Cir.), *cert. denied*, 423 U.S. 831, 96 S.Ct. 52, 46 L.Ed.2d 49 (1975)], hold that a patentee may incur antitrust liability for even the good faith prosecution of a valid patent where it is shown that the infringement suit "was brought in furtherance and as an integral part of a plan to violate the antitrust laws." 601 F.2d at 994. (Citations omitted). *See also Mach-Tronics, Inc.* v. *Zirpoli*, 316 F.2d 820, 830-31 (9th Cir. 1963).

The fact that the Ninth Circuit cases involving enforcement litigation as an integral part of an overall scheme which violates the antitrust laws arise in the context of patent litigation does not intimate that such a theory is only viable in the patent context.[35] We see no reason for refusing to extend the rationale of these patent-antitrust cases to overall antitrust schemes in other contexts.

The Tenth Circuit has extended the *Singer* doctrine to protests involving the ICC. In *Webb v. Utah Tour Brokers Association*, 568 F.2d 670 (10th Cir. 1977), the Tenth Circuit held that antitrust liability attached to tour operators who used protests to the ICC as a means to further an illegal boycott. In finding liability the *Webb* court stated:

> It is apparent that in the case at bar the trial court was correct in recognizing that the activities of the defendants went far beyond the use of legal procedures in order to protect the public interest. The activities here were designed to and succeeded in bringing about a boycott of the plaintiffs, which reduced their competitive significance and caused a substantial loss.

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35. Rather, it is indicative only of the uneasy, but recurring, interplay between patent law, which authorizes monopolies, and antitrust law, which prohibits and punishes monopolies. *See Handgards*, 601 F.2d at 992 n.10.

> Accordingly, we must conclude that the governing law is that set forth in the boycott cases rather than the exemption decisions in *Noerr Motor Freight, Inc.* and its progeny. *Id.* at 676.

The defendants contend, however, that *Noerr-Pennington* protects petitioning activity even if it is a part of an independent antitrust violation. As support, defendants cite *Pennington:* "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593.

Contrary to the defendants' assertions, this statement does not provide them with *Noerr* immunity for an overall and independent antitrust violation. This statement, rather, provides immunity only for the narrow petitioning activity, if done with the requisite intent to influence government action. Clipper, in this cause of action, is not challenging merely the petitioning activity. Rather, it challenges the defendants' entire course of conduct, which allegedly resulted in the price fixing and trade restraints. No one has contended that the alleged price-fix conspiracy was intended to influence governmental actions. The defendants' actions do not enjoy immunity, even though a part of the actions may have involved protected first amendment petitioning. The reach of the *Noerr-Pennington* doctrine is not that extensive, and the antitrust laws are not that impotent.

Clipper, aided by the judicial admissions of the defendants, has established that defendants conspired to fix prices and restrain trade, and that this conspiracy was in part enforced by protests to the ICC. Clipper has therefore stated a claim for relief as a matter of law. The defendants contend, however, that whatever conspiracy they engaged in was protected by § 5a of the ICA. Section 5a of the ICA provides immunity from the antitrust laws for collective rate agreements in certain circumstances. In ruling on the defendants' summary judgment

motion, the district court did not determine whether such circumstances existed here. Clipper, in its briefs, contends that there was no such ICA immunity here. On the record this court is not in a position to determine the existence of § 5a immunity. That determination involves the resolution of disputed issues of fact, including the need for ICC approval of questioned rates, the existence of ICC approval of the rate bureau agreement, the extent of any such approval, and, assuming approval, the existence of any activities by the defendants beyond that approval. We therefore remand this issue to the district court to determine whether the defendants' activities enjoyed § 5a immunity for the alleged conspiracy to price-fix and restrain trade.

DAMAGES

Clipper alleged that the defendants' conduct caused Clipper to be damaged in the amount of thirty million dollars, and it asked for treble that amount. Clipper's damage claim rests on three distinct theories: (1) once Clipper published and defendants protested the $1,056 rate, Clipper was effectively barred from publishing its $842 rate until the investigation of the $1,056 rate was resolved in Clipper's favor—two years later. Clipper seeks the damages resulting from the two-year delay in publishing the $842 rate; (2) Clipper seeks to recover costs incurred in defending against defendants' sham protests;[36] and (3) the ICC investigation of the $1,056 rate, caused by the defendants' protests, placed a "cloud" on the legality of that rate during the time it was under investigation. Shippers will not generally use a rate when it is under investigation. Clipper seeks to recover for the business lost or deterred by this cloud.

Defendants respond that Clipper's damage claim is barred by *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47.

36. In their brief, defendants contend that Clipper's costs in defending against the protests were quite small, and they imply that because they were small, they are noncompensatory. We are not here concerned with the amount of damage. That is a question for the trier of fact. Our sole concern is whether the theory on which damages are claimed is viable.

67 L.Ed. 183 (1922)[37] The district court agreed with the defendants, holding: "Furthermore, plaintiff's damage claims, which rest on assumptions as to action that would have been taken by the ICC in the absence of defendants' alleged antitrust violations, are barred by *Keogh v. Chicago & N.W. Ry. Co.* . . ." (citation omitted). We disagree.

In *Keogh* a shipper sued several carriers, alleging that the carriers had conspired to set arbitarily high rates, and that this conspiracy violated the antitrust laws. The plaintiff claimed that the rate filed by the carrier defendants was illegal, even though the rate had received ICC approval. Plaintiff sought as damages the difference between the rate which had received ICC approval and some hypothetical, unset rate that would have been in effect, absent the conspiracy. The Court held that no antitrust action was stated; the exclusive remedy was held to be contained in the Act to Regulate Commerce (now the ICA). The Commerce Act provided for a damage recovery with illegal rates. The court further noted that the challenged rate was legal, having received ICC approval. They also noted that judicial antitrust relief here would frustrate the intent of Congress—Congress having passed the Commerce Act to insure

37. Defendants also contend that Clipper's damage claim is not compensable because Clipper caused its own injury by deliberately adopting a piecemeal filing strategy before the defendants undertook to protest. It is clear that the only antitrust damages that are recoverable are those which are caused by the defendants' illegal conduct. *See Kapp* v. *Nat'l Football League,* 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). This causation problem, however, is properly determined by the trier of fact. Whether defendants' acts damaged Clipper, and the extent of that damage, is not before us at this time.

The defendants also contend that because RMMTB and not the individual motor carrier defendants filed the protests, only RMMTB could have any liability. The defendants contend that for a member of an association to be liable for an association's acts in violaton of antitrust laws the member must have "knowlingly, intentionally and actively participated in an individual capacity in the scheme." *Kline* v. *Coldwell, Banker & Co.,* 508 F.2d 226, 232.

The liability of the individual defendants is not now before this court. Our sole concern at this time is whether a triable cause of action is stated. If so, it will be up to the trier of fact to determine, under the applicable law, which defendants are liable, and the extent of that liability.

uniform rates. Judicial relief would result in a lower rate to plaintiff than to other shippers, and thus be a discriminatory rebate. Finally, the court noted that judicial relief here would require the court to speculate on the level the rate would have been set by carriers and approved by the ICC absent the conspiracy, thereby assuming what ICC action would be.

None of these decisional bases appear in the instant case. *Keogh* is not even arguably applicable as a bar to Clipper's second and third damage claims. Clipper's second damage claim is for the costs of defending against the protests. There is no applicable ICC remedy to recover these costs. An award of these costs by a court would not interfere with the ICC, nor would it be discriminatory. Finally, awarding these damages does not require the court to make any assumptions as to ICC actions.

The same analysis applies to Clipper's third damage claim to recover for profits lost because of the "cloud" on Clipper's rate while it was under investigation. There is no ICC remedy applicable. Awarding damages for this would not interfere with the regulatory framework of the ICC. Finally, although it might be hard to prove these damages, the proof does not require that any assumptions about ICC action be made.

Finally, *Keogh* does not apply to bar Clipper's first damage claim. Clipper claims that it was damaged because the defendants' protests prevented Clipper's filing of the $842 rate for two years. Unlike *Keogh*, there is no remedy under the ICA for Clipper's claim. Moreover, it is not a question of a challenge to the legality of a rate approved by the ICC. Here, the claim is that defendants' actions delayed for two years the filing of a rate—which the ICC ultimately approved. Relief here would not disturb any uniform rates; it would do nothing to ICC-approved rate structure. Finally, judicial relief here would not involve the speculation that was at issue in *Keogh*. In *Keogh* there was no evidence of what the legal ICC approved rate would be absent the conspiracy. Here the allegations indicate that Clipper would have filed an $842 rate, and the

subsequent ICC approval suggests that rate might have been approved two years earlier. Of course, there is no certainty the rate would have been approved. The speculation involved in the instant case, however, in no way approaches the degree of speculation disallowed in *Keogh*. There is, therefore, no reason to find that *Keogh* bars this damage claim.

There are a myriad of cases that deal with the interplay of regulation and antitrust law.[38] None of these cases precludes Clipper's damage claim. These cases have been careful to note that courts should not displace antitrust law for regulation, in the absence of a clear conflict between antitrust law and regulation. There is no clear conflict here between antitrust and regulation. We therefore find that there is a damage remedy for the antitrust violation.

REVERSED and REMANDED.

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38. *See, e.g., Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (when agency (CAB) had power to approve monopolistic practice and did in fact approve the practice, no antitrust action would lie); *Far East Conference* v. *United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952) (when challenged conference agreement had been approved by U.S. Shipping Board under authority of Shipping Act of 1916, no antitrust action based on challenge to conference agreement would lie). *See also United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

See Keogh v. *Chicago & N. W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922) (ICC vested with pervasive rate setting power; court cannot intervene if it would upset rate structure); *Georgia* v. *Penn. R.R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) (ICC has pervasive power over rate setting; court interference would result in unjust discrimination contrary to Congressional intent; Court noted that ICA does not provide remedies for the correction of *all* of the abuses of rate-making which might constitute violations of antitrust laws.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-72-863 AJZ

Clipper Exxpress, a corporation,
Plaintiff,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., et al.,
Defendants.

[July 27, 1978]

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS

All defendants other than Lee Way Motor Freight, Inc. have filed a single motion for summary judgment. Defendant Lee Way has filed a separate motion for summary judgment, as well as a motion to dismiss for insufficient service of process.

With regard to the motions for summary judgment, the issues are purely legal ones. Plaintiff's claim, insofar as it is based on defendants' protests before the Interstate Commerce Commission, is barred by the doctrine developed in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). Plaintiff's attempt to invoke the "sham" exception to that immunity, as defined in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), is, under the undisputed facts in this case, foreclosed by the narrow reading of that exception announced in *Franchise*

Realty Interstate Corp v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir.), *cert. denied*, 430 U.S. 940 (1977).

Furthermore, plaintiff's damage claims, which rest on assumptions as to action that would have been taken by the ICC in the absence of defendants' alleged antitrust violations, are barred by *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922).

All defendants are therefore entitled to summary judgment in their favor. Moreover, the motion of Lee Way for dismissal for insufficient service of process must also be granted in view of the circumstances under which that defendant entered this lawsuit.

IT IS THEREFORE ORDERED that the motions of all defendants for summary judgment are granted.

IT IS FURTHER ORDERED that the motion of defendant Lee Way for dismissal for insufficient service of process is granted.

Dated: July 27, 1978

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix C
District Court's Order Denying Motion to Vacate Judgment

C-45

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-72-863 AJZ

Clipper Exxpress, a corporation,
Plaintiff,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., et al.,
Defendants.

[October 13, 1978]

ORDER DENYING MOTION TO VACATE JUDGMENT

On September 14, 1978, this court heard the motion of plaintiff to reconsider the court's order of July 27, 1978, granting motions for summary judgment and to vacate the judgment entered pursuant to that order on July 31, 1978. At the hearing of said motion the Interstate Commerce Commission was granted leave to appear as amicus and to argue in support of plaintiff's motion.

After having heard and considered the arguments of counsel and the papers and briefs filed in support thereof, and being fully advised in the premises, the court remains of the view that plaintiff's attempt to invoke the "sham" exception to the immunity doctrine developed in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), is foreclosed by the Ninth Circuit's reading of that exception in *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Work-*

ers, 542 F.2d 1076 (9th Cir.), *cert. denied,* 430 U.S. 940 (1977). Such narrow reading of the exception relied upon by plaintiff was recently approved in *Mark Aero, Inc.* v. *Trans World Airlines, Inc.,* 1978-2 Trade Reg. Rep. (CCH) ¶ 62,135 (8th Cir., July 6, 1978), wherein the court said:

> . . .All of these actions are joint efforts to influence governmental action. As such they fall within the *Noerr* umbrella and cannot give rise to Sherman Act liability.
>
> It matters not that the sole purpose alleged to underlie the attempt to influence governmental action was to hamper a competitor's business activities. . . .

Id. at 75,006.

> . . .In the case before us it is alleged that the defendants have engaged in a publicity campaign involving the media and various citizens groups, that they have induced the Aviation Department of the City to refuse to make application to the FAA for approval of a master security plan, that they have made and induced others to make false and misleading statements to, and used "economic coercion" on, the City Council. These actions may all be admitted, and we take them as true, but what is being complained about is genuine political activity, protected by the first amendment rights of free speech and freedom of petition.[35] . . . [Footnote 35 is a specific reference to and approval of *Franchise Realty Interstate Corp.*]

Id. at 75,007.

IT IS HEREBY ORDERED that the motion to vacate the summary judgment entered on July 31, 1978, is denied.

Dated: October 13, 1978

/s/ ALFONSO J. ZIRPOLI

United States District Judge

Appendix D
Court of Appeals' Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3684
D.C.No. C-72-863 AJZ

Clipper Exxpress, a corporation,
Plaintiff-Appellant,

vs.

Rocky Mountain Motor Tariff Bureau, Inc., Yellow Freight Systems, Inc., Consolidated Freightways Corporation of Delaware, Illinois-California Express, Inc., IML Freight, Inc., Pacific Intermountain Express Co., T.I.M.E.—D.C., Inc., Consolidated Copperstate Lines, Garrett Freight Lines, Inc., Navajo Freight Lines, Inc., N.W. Transport Service, Inc., Ringsby Truck Lines, Inc., Rio Grande Motor Way, Salt Creek Freight Ways, Transcon Lines, United Buckingham Freight Lines and Western Gillette, Inc.,
Defendants-Appellees.

[October 6, 1982]

ORDER

Before: WALLACE and ALARCON, Circuit Judges
and von der HEYDT,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable James A. von der Heydt, Chief United States District Judge, District of Alaska, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Opinion (Slip op. April 19, 1982 at p. 1580) is amended as follows:

At Slip op. p. 1590, second column, line 25 (first indented quotation), after said quotation add:

. . . .

> Again, for the purpose of this motion, the court may accept Clipper's allegations as fact and assume that defendants expressly agreed among themselves not to cut rates to divert traffic from one another—or to put it more bluntly, that they agreed that their rates would be exactly the same. Such an agreement would be perfectly lawful and immunized from antitrust liability.

. . . .

At Slip op. p. 1598, the following should be added to Footnote 25:

> Our view that a single sham action is sufficient is not inconsistent with the holding in *Ad Visor, Inc.* v. *Pacific Telephone & Telegraph Co.*, 640 F.2d 1107 (9th Cir. 1981). In *Ad Visor,* we stated "Multiplicity, by itself, does not vitiate the *Noerr-Pennington* protections." *Id.* at 1109.
>
> In support of this view, we relied upon the following language from Justice Blackman's [sic] concurring opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S.Ct. 2881, 33 L.Ed. 1009 (1977): "Since I believe that federal courts should be hesitant indeed to enjoin ongoing state court proceedings, I am of the opinion that a pattern of *baseless,* repetitive claims or *some equivalent showing* of

grave abuse of the state courts must exist before an injunction would be proper." 433 U.S. at 644 (emphasis added).

Thus, it is not the number of claims which is controlling, but whether the evidence shows that the claim or claims filed constitute an abuse of process. Where the facts are in dispute, this is a question for the trier of fact.

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

49 U.S.C. § 10708(a)(1) provides as follows:

> (a)(1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when—
>
> > (A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or
> >
> > (B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

49 U.S.C. § 10761(a) provides as follows:

> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that

rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762(a)(1) provides as follows:

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Appendix F

Conflicting Decisions on the Sham Exception to Noerr-Pennington Immunity

F-52

I. "Pattern of Repetitive Claims" Requirement

"[W]e hold that a single suit, or in this case a single protest, is sufficient to invoke the sham exception."
—*Clipper Exxpress,* App. A, p. A-23, 674 F.2d at 1267

A. CASES REQUIRING MORE THAN A SINGLE SUIT OR PROTEST TO INVOKE SHAM EXCEPTION.

1. *Mid-Texas Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 615 F.2d 1372, 1384 n.9 (5th Cir.), *cert. denied,* 449 U.S. 912 (1980):

"[Plaintiff] has not alleged a consistent pattern whereby [defendant] refused interconnection requests in all cases and then raised points of procedure for the purposes of delay before the FCC.... Thus, the situation is unlike [*Trucking Unlimited*]...."

2. *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977) (per curiam):

"This was the only suit initiated by defendants-appellees then or later against the plaintiff.... This case is clearly distinguishable from [*Trucking Unlimited*]."

3. *Johns-Manville Corp.* v. *Guardian Industries, Corp.*, 1981-1 Trade Cases ¶ 64,054, at 76,426-427 (E.D. Mich. Apr. 27, 1981):

B. CASES STATING THAT A SINGLE SUIT OR PROTEST IS SUFFICIENT TO INVOKE SHAM EXCEPTION.

1. *Feminist Women's Health Center, Inc.* v. *Mohammed,* 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979):

"[A] triable issue of fact remains as to whether the [defendants' single] letter of complaint ... was but a sham effort to influence government action."

2. *Sage International, Ltd.* v. *Cadillac Gage Co.*, 507 F. Supp. 939, 946 (E.D. Mich. 1981):

"[T]he better view is that there is no *per se* requirement of successive ill-founded suits to support a sham litigation claim."

3. *First National Bank of Omaha* v. *Marquette National Bank of Minneapolis,* 482 F. Supp. 514, 520 (D. Minn. 1979), *aff'd,* 636 F.2d 195 (8th Cir. 1980), *cert. denied,* 450 U.S. 1042 (1981):

"[O]ne lawsuit may be sufficient in some cases to bring a defendant's conduct within the 'sham exception'....

"[D]efendants' allegations do not fit the sham exception; they do not allege anything approaching [a] pattern of abusive litigation . . . . "

4. *Reaemco, Inc.* v. *Allegheny Airlines,* 496 F. Supp. 546, 557 (S.DN.Y. 1980):

"[T]here is no allegation that defendants engaged in a repetitive pattern of conduct . . . . Thus [plaintiff] cannot invoke the sham exception . . . . "

5. *S. M. Arnold, Inc.* v. *Union Carbide Corp.,* 487 F. Supp. 1182, 1184 (E.D. Mo. 1980):

"The absence of an alleged repetitive pattern of sham litigation . . . serves to reinforce the Court's determination that plaintiffs acted in good faith as a matter of law."

6. *Mountain Grove Cemetary Association* v. *Norwalk Vault Co. of Bridgeport, Inc.,* 428 F. Supp. 951, 955-56 (D. Conn. 1977):

"If the institution of a single lawsuit could be the predicate for an antitrust violation . . . then no business organization could seek a judicial determination of its rights *vis-a-vis* a competitor without assessing the antitrust implications of its contemplated legal action."

4. *Technicon Medical Information Systems Corp.* v. *Green Bay Packaging, Inc.,* 480 F. Supp. 124, 127 (E.D. Wis. 1979):

"[T]he bringing of one lawsuit in bad faith or without probable cause is sufficient to bring the action within the sham exception . . . . "

5. *Colorado Petroleum Marketers Association* v. *Southland Corp.,* 476 F. Supp. 373, 379-80 (D. Colo. 1979):

"[We] conclude that a single lawsuit can provide the basis for invoking the 'sham exception' . . . . "

6. *Outboard Marine Corp.* v. *Pezetel,* 474 F. Supp. 168, 175 n.9 (D. Del. 1979):

"[T]he Supreme Court has strongly suggested that one harassing piece of litigation may be enough to invoke the protection of the antitrust laws under the [sham] exception."

7. *Cyborg Systems, Inc.* v. *Management Science America, Inc.,* 1978-1 Trade Cases ¶ 61,927, at 73,918

7. *Strategic Marketing Services, Inc.* v. *Cut & Curl, Inc.*, 1977-2 Trade Cases ¶ 61,788, at 73,243 (D. Conn. Dec. 22, 1977):

"As defendants contend, the bringing of a single lawsuit, even for an anti-competitive purpose, is not actionable under the antitrust laws."

8. *Central Bank of Clayton* v. *Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd without op.*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977):

"In the instant case, there was only *one* lawsuit."

9. *Bethlehem Plaza* v. *Campbell*, 403 F. Supp. 966, 970 (E.D. Pa. 1975):

"Here, we are not faced with a pattern of litigation, but with *one* lawsuit . . . . "

"These opinions [in *Vendo Co.*] suggest that a majority of the Court would find that the sham litigation exception can be applied to a case involving only one lawsuit."

8. *Associated Radio Service Co.* v. *Page Airways, Inc.*, 414 F. Supp. 1088, 1096 (N.D. Tex. 1976), *aff'd*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981):

"Defendants urge that filing one state suit . . . is insufficient as a matter of law to constitute abuse of the legal process . . . . [However,] plaintiff need only show that the Defendant instituted litigation with the *purpose* of achieving a collateral and unlawful objective . . . . "

C. CASES LEAVING OPEN THE ISSUE WHETHER A SINGLE LAWSUIT INVOKES SHAM EXCEPTION.

1. *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1177 (10th Cir. 1982):

"[W]e need not address ourselves here to the further question as to whether a *single* sham lawsuit is sufficient basis for a subsequent antitrust action . . . ."

II. Test of "Baselessness"

"[T]he fact that defendants lost all protests[1] establishes a sufficient showing of baselessness."

—*Clipper Exxpress*, App. A, p. A-23, 674 F.2d at 1267

A. CASES HOLDING THAT LACK OF ULTIMATE SUCCESS ON THE MERITS DOES NOT ESTABLISH BASELESSNESS.

1. *Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980):

"[Plaintiffs'] argument that some of these proceedings could only delay and not ultimately defeat [plaintiffs' proposed] construction of the shopping mall [does] not render those efforts frivolous."

2. *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1363-64 (D.D.C. 1981):

B. CASES HOLDING THAT LACK OF ULTIMATE SUCCESS ON THE MERITS MAY ESTABLISH BASELESSNESS.

1. *Ernest W. Hahn, Inc.* v. *Codding*, 615 F.2d 830, 841 (9th Cir. 1980):

"Another factor we rely upon is that each one of the various lawsuits has been decided against [defendant]. This certainly is the hallmark of insubstantial claims . . . ."

2. *Baxter Travenol Laboratories, Inc.* v. *Le May*, 536 F. Supp. 247, 252 (S.D. Ohio 1982):

1. The Court of Appeals having assumed that "all protests" were equivalent to a single protest, this statement applies to loss of a single protest. App. A, pp. A-18-A-19, 674 F.2d at 1265.

"[T]he evidence shows little more than that . . . the FCC ultimately ruled against Bell. The sham exception . . . must be narrowly construed so as not to chill the rights of individuals and corporations to access to courts and to legislative and regulatory bodies. This principle would be hindered by a ruling which exposed an entity to antitrust liability on the basis that an official body found its contentions to be . . . without merit."

C. CASES HOLDING THAT ULTIMATE SUCCESS ON THE MERITS ESTABLISHES THAT LITIGATION ACTIVITIES WERE NOT BASELESS.

1. *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977)(per curiam):

"The record clearly discloses that they prevailed in that litigation . . . . This case is clearly distinguishable from [*Trucking Unlimited*]."

2. *Horseman's Benevolent & Protection Association v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098, 1110 (E.D. Pa. 1982):

"[T]here are no specific factual allegations of sham activity . . . . On the contrary, the gravamen of the complaint is that the [defendant] . . . was successful in influencing the Commission. . . ."

"[T]he termination of the litigation in favor of the antitrust plaintiff, while not a rigid requirement in all circumstances, is strong evidence, and probably dispositive of, the issue of the allegedly 'baseless' nature of litigation."

D. CASES HOLDING THAT ULTIMATE SUCCESS ON THE MERITS DOES NOT ESTABLISH THAT PROTEST OR SUIT WAS NOT BASELESS.

1. *Sunergy Communities, Inc. v. Aristek Properties, Ltd.*, 535 F. Supp. 1327, 1331 (D. Colo. 1982):

"[S]uccess is, in any event, only one factor to consider in determining whether an action is a 'sham' . . . ."

2. *Ross v. Bremer*, 1982-2 Trade Cases ¶64,746, at 71,618 (W.D. Wash. March 16, 1982):

"This court does not believe that success alone can be considered determinative that a course of lawsuits will be protected under *Noerr-Pennington*."

3. *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168, 179 (D. Del. 1979):

"[Plaintiff] argues that the fact that [it] was successful before the agency . . . takes [it] out from under . . . the 'sham' exception . . . . [There is no support for] plaintiff's position . . . ."

3. *Town of Massena* v. *Niagara Mohawk Power Corp.*, 1980-2 Trade Cases ¶ 63,526, at 76,818 (N.D.N.Y. Sept. 8, 1980):

"[Defendant] was successful in this action and the lawsuit may not therefore be characterized as a 'sham.' "

E. CASES HOLDING THAT LACK OF PROBABLE CAUSE TO SUE OR PROTEST DOES NOT ESTABLISH BASELESSNESS.

1. *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982):

"[T]he term 'sham' is something more than a mere 'absence of probable cause.' "

F. CASES HOLDING THAT LACK OF PROBABLE CAUSE TO SUE OR PROTEST ESTABLISHES BASELESSNESS.

1. *Mid-Texas Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 615 F.2d 1372, 1384 n.10 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980):

"[Plaintiff must prove] that [defendant] opposed [plaintiff's] informal complaint before the FCC and demanded a hearing without any probable cause and totally regardless of the merits . . . ."

2. *Chest Hill Co.* v. *Guttman*, 1981-2 Trade Cases ¶ 64,417, at 75,055 (S.D. Ohio May 29, 1981):

"The test, then, in determining whether the antitrust defendants have engaged in a 'pattern of baseless claims' . . . is whether they had probable cause in filing the claims."

3. *S. M. Arnold, Inc.*, v. *Union-Carbide Corp.*, 487 F. Supp. 1182, 1184 (E.D. Mo. 1980):

"Defendant has misconstrued the ... 'sham exception'.... Without now addressing the merits of plaintiffs' complaint, it may be noted that it was not made without probable cause."

G. CASES EMPLOYING A "GENUINE DISPUTE," "LEGITIMATE CONCERN," OR "REASONABLE BASIS TO SUE OR PROTEST" TEST OF BASELESSNESS.

1. *Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1200 (8th Cir. 1982):

"[W]e cannot say that the legal claims... were so groundless as to come within the 'sham litigation' exception.... There were genuine disputes regarding... solicitation methods."

2. *Landmarks Holding Corp.* v. *Bermant*, 664 F.2d 891, 897 (2d Cir. 1981):

"[T]he defendants had no reasonable basis for their appeals from the decision of the [city planning and zoning commission]...."

3. *WIXT Television, Inc.* v. *Meredith Corp.*, 506 F. Supp. 1003, 1032 (N.D.N.Y. 1980):

"[Defendant's] reasons for objecting to plaintiff's application are far from... 'baseless'.... the possible 'ghosting' problem caused by the new antenna was a 'legitimate concern' to plaintiff's competitors."

4. *City of Newark* v. *Delmarva Power & Light Co.*, 497 F. Supp. 323, 327 (D. Del. 1980):

"Because plaintiffs purchase electric power at wholesale from [defendant], they clearly have a legitimate interest in defendant's wholesale tariff proceedings before the Commission."

5. *Pennwalt Corp.* v. *Zenith Laboratories, Inc.*, 472 F. Supp. 413, 424 (E.D. Mich. 1979), *appeal dism'd without op.*, 615 F.2d 1362 (6th Cir. 1980):

"There has been nothing to suggest that [plaintiff] did not have valid claims against the [defendants] who have been joined in this lawsuit .... This is not what is meant by a sham."

6. *Foret* v. *Point Landing, Inc.*, 1976-2 Trade Cases ¶ 61,106, at 70,012 (E.D. La. Oct. 1, 1976):

"[Defendant's] applications were a part of a legitimate protection of its interests. . . ."

III. Requirement of "Access-Barring"

"We have found no precedent nor any reason to require access barring before the sham exception can be invoked."
—*Clipper Exxpress*, App. A, p. A-27, 674 F.2d at 1269

A. CASES REQUIRING ACCESS BARRING BEFORE SHAM EXCEPTION IS INVOKED.

1. *Federal Prescription Service, Inc.* v. *American Pharmaceutical Association*, 663 F.2d 253, 262 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1293 (1982):

"What is needed . . . is proof that the [defendants] . . . effectively barred [plaintiff's] access to these [governmental] processes . . . ."

2. *Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980):

" '[A]ccess-barring is the cornerstone to the sham exception.' "

B. CASES HOLDING THAT ACCESS BARRING IS NOT REQUIRED TO INVOKE SHAM EXCEPTION.

1. *Ernest W. Hahn, Inc.* v. *Codding*, 615 F.2d 830, 841 n.14 (9th Cir. 1980):

"It has been suggested that *Franchise Realty* requires a showing . . that the plaintiff has been barred from meaningful use of the agency or tribunal. . . . [W]e decline to follow this interpretation . . . ."

2. *Outboard Marine Corp.* v. *Pezetel*, 474 F. Supp. 168, 178 (D. Del. 1979):

"None of the cases . . . appear to concur with plaintiff's interpretation that the 'sham' exception can only be successfully

3. *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 982-83 (7th Cir. 1980), *cert. denied*, 450 U.S. 960 (1981):

"As in [*Trucking Unlimited*], the [plaintiffs] . . . are being denied effective access to timely consideration by the federal commission . . . ."

4. *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978):

"[W]hat is being complained about . . . . [does not] 'bar access' in the sense employed in [*Trucking Unlimited*].

5. *Webb* v. *Utah Tour Brokers Association*, 568 F.2d 670, 674 (10th Cir. 1977):

"[U]tilization of the court or the administrative agency to the extent of monopolizing the available process could constitute a sham."

6. *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 232 (7th Cir. 1975):

"Allegations that the council or its committees did not hold hearings do not amount to allegations of effective denial of access to the city council."

7. *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1362-64 (D.D.C. 1981):

"[T]he sham exception is not satisfied by a mere invoked when literal exclusion from the agency proceedings has occurred."

showing of anticompetitive intent . . . there must also be proof that those being charged . . . effectively barred access to [governmental process] . . . ."

8. *Bustop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 995 (S.D.N.Y. 1981):

"[T]he key to the sham exception . . . is barring a competitor 'from meaningful access to adjudicatory tribunals . . . .' "

9. *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1033 (N.D. N.Y. 1980):

"The mere allegation of denial of access . . . does not remove this [First Amendment] shield, especially where plaintiff has been given every opportunity to pursue its rights before the very same government agency it asserts it has been denied access to."

10. *Yellow Atlantic Container Line*, 498 F. Supp. 105, 110 (E.D. Mo. 1980), *aff'd*, 668 F.2d 350 (8th Cir. 1981), *cert denied*, 102 S. Ct. 2039 (1982):

"There is no allegation that the plaintiff's access . . . has been barred or impeded in any way. In fact, plaintiff alleges that it is currently a party to [the Commission proceedings]."

11. *City of Newark v. Delmarva Power & Light Co.*, 497 F. Supp. 323, 327 (D. Del. 1980):

"[Plaintiffs] are not alleged to have impeded [defendant's] access to the Commission or indeed to have done anything other than participate on an adversary basis before the Commission in accordance with its rules."

12. *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 (S.D.N.Y. 1980):

"The core element of this ... sham exception ... is the effective exclusion of a party from access to the decision-making process."

13. *Town of Massena v. Niagara Mohawk Power Corp.*, 1980-2 Trade Cases ¶ 63,526, at 76,818 (N.D.N.Y. Sept. 8, 1980):

"[F]ar from denying [plaintiff] free and unlimited access... the defendant has compelled [plaintiff] to fully avail itself of these adjudicatory processes...."

14. *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 482 F. Supp. 514, 521 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1982):

"[P]laintiffs have not made any assertion that [defendant]

sought to bar its competitors from meaningful access to adjudicatory tribunals . . . ."

15. *Wilmorite, Inc. v. Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *aff'd without op.*, 578 F.2d 1372 (2d Cir. 1978), *cert. denied*, 439 U.S. 983 (1978):

"[A]ccess-barring is the cornerstone to the sham exception."

16. *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd without op.*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977):

"Plaintiff was *not* effectively barred from access to the agencies and courts . . . ."

17. *First Delaware Valley Citizens Television, Inc. v. CBS, Inc.*, 398 F. Supp. 917, 923-24 (E.D. Pa. 1975):

"If these allegations could be proved . . . they most obviously have not deterred the plaintiff from having free and unlimited access to the FCC."